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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1930.

No. [redacted] 43

Bandini Petroleum Company, a corporation; Commodore Petroleum Company, a corporation; Wilshire Oil Company, Inc., a corporation; Wilshire Annex Oil Company, a corporation; and Ambassador Petroleum Company, a corporation,

Appellants,

vs.

The Superior Court of the State of California, in and for the County of Los Angeles, and Honorable William Hazlett, as one of the judges thereof,

Appellees.

STATEMENT OF APPELLEES AS TO JURISDICTION ON APPEAL.

U. S. WEBB,
Attorney General of the State of California,
JAMES S. BENNETT,
Attorney for the Director of Natural Resources of the State of California,
Attorneys for Appellees.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1930.
No. 852.

Bandini Petroleum Company, a corporation; Commodore Petroleum Company, a corporation; Wilshire Oil Company, Inc., a corporation; Wilshire Annex Oil Company, a corporation; and Ambassador Petroleum Company, a corporation,

Appellants,

vs.

The Superior Court of the State of California, in and for the County of Los Angeles, and Honorable William Hazlett, as one of the judges thereof,

Appellees.

STATEMENT OF APPELLEES AS TO JURISDICTION ON APPEAL.

May It Please the Court:

The appellees in opposing the jurisdiction of this court to review the above entitled cause on appeal or certiorari respectfully call attention to the brief filed by them on their "Motion to Dismiss the Appeal or Affirm the Judgment Below," and represent:

Nature of Case and Ruling Below.

The appellee Superior Court, having general jurisdiction in equity and particular statutory authority to enjoin the *unreasonable waste of natural gas* at the suit of the Director of Natural Resources in the name of the People of the State, granted a preliminary injunction (reserving power to modify the same upon five days' notice), restraining each defendant, including appellants, operating oil and gas wells in the Santa Fe Springs Oil Field in the State of California, from producing in excess of a given quantity of natural gas each average day from each lease or other property unit until the cause could be tried on its merits. The basis for the quantity of allowed gas production was derived from the potential production of oil from each property unit and the allowed quantity then increased as other factors required to maintain the equitable position of the parties pending the trial of the cause. [Preliminary Injunction, R. p. 295, *et seq.*] This preliminary injunction curtailed appellants' gas production from 57,120,000 to 28,160,000 cu. ft. a day. Of the 57,120,000 cu. ft. it was admittedly blowing to the air approximately 40%, amounting to 22,848,000 cu. ft. a day. (Appellants' Brief in Opposition to Motion, at p. 14.) Upon this preliminary injunction being granted, the appellants applied to the District Court of Appeal of the State of California for a writ of prohibition to prevent the appellee Superior Court from proceeding to enforce the injunction or grant other injunctive relief. An alternative writ of prohibition was issued, and upon the hearing the writ of prohibition was denied by the District Court of Appeal. (Decision and Opinion, *Bandini Pet.*

Co. v. Superior Court, 63 Cal. App. Dec. 1175 [R. p. 333, *et seq.*]. A copy of the opinion is printed at the end of this Statement.) Appellants applied to the Supreme Court of California for a hearing to review the decision of the District Court of Appeal and this application was denied [R. p. 671½]. The appeal to this court is from the final order of the District Court of Appeal of California denying the Writ of Prohibition so sought against the appellee Superior Court proceeding in a suit in equity brought under statutory authority in the name of the People of the State to restrain the unreasonable waste of natural gas declared unlawful by the statutes of the state (Chap. 535, Stats. Cal. 1929, pp. 927-930, Supp. to Brief on Motion, pp. 4, 10. No useful purpose will be served by repeating here the authorities or argument presented in the brief filed by us on "Motion to Dismiss Appeal or Affirm the Judgment Below," and we refer to that brief for a more extended statement of facts and the points and authorities upon which appellees rely.

When the Federal Questions Pressed Have Been So Explicitly Decided by This Court as to Foreclose Further Argument on the Subject, This Court Will Not Take Jurisdiction. Such Is the Case Here.

This rule was clearly stated by this court in *Equitable Life Assurance Society v. Brown,* 187 U. S. 308, 314, as follows:

> "From the analysis just made, it results that although a Federal question was raised below in a formal manner, that question, when examined with reference to the averments of fact upon which it was made to depend, is one which has been so explicitly

> decided by this court as to foreclose further argument on the subject, and hence to cause the Federal question relied upon to be devoid of any substantial foundation or merit. This being so, the case is brought directly within the rule announced in *New Orleans Waterworks Co. v. Louisiana,* 185 U. S. 336, 345, 46 L. Ed. 936, 941, 22 Sup. Ct. Rep. 691, and authorities there cited."

Two Federal questions are raised in this formal manner. The *first* goes to the power of the state to prohibit the waste of natural gas, and the *second,* to the degree of certainty required in the state statute to meet the requirements of "due process of law". The *third* point raised is one of state practice in respect to the sufficiency of the evidence to sustain the jurisdiction of the equity court in issuing the preliminary injunction complained of.

While the District Court of Appeal assumed that the *first* and *second* points involved Federal questions, that court decided each of them on the authority of decisions in this court, which it regarded as having so conclusively and explicitly determined them that under the rule of practice in this court a substantial Federal question no longer exists.

The Power of the State to Prohibit the Waste of Natural Gas Has Been Explicitly Decided by This Court.

The power of each state to frame its laws and policies and in so doing to determine when the intangible right to produce oil and gas through wells drilled on parcels of property shall ripen into ownership of the quantity of oil and gas taken possession of at the surface and to regulate the conflicting rights of landowners in so acquiring title

by statutes prohibiting waste in the interest of the public welfare have been so explicitly decided by this court as to foreclose further argument on the subject. (*Ohio Oil Co. v. Indiana*, 177 U. S. 190; *Bacon v. Walker*, 204 U. S. 313, 315; *Walls v. Midland Carbon Co.*, 254 U. S. 300, followed by the Supreme Court of California in *People v. Associated Oil Co.*, Appx. B, p. 29, Supplement to Brief on Motion herein. Opinion not yet officially reported.)

In its opinion in the last cited case, the Supreme Court of California said:

> "The generally accepted view, therefore, is that the property right of the owner or lessee of land in and to the gas and oil beneath the surface is not an absolute one. Such substances, because of their peculiarity in the natural state, partake more of the nature of common property, title to which becomes absolute when they are captured and reduced to possession. Because of their peculiar nature the public has a definite interest in their preservation from waste and destruction."

The Supreme Court of California by its opinions interpreting and construing this statute has defined and declared the land law of the state so that we now know (1) that the fee title to a parcel of land does not include ownership of oil and gas in a stratum extending under several parcels; (2) that each such fee owner has a right correlative with each other such fee owner to acquire title to his reasonable share of such oil and gas by operations on his land parcel; (3) that the public has an interest in this natural resource of oil and gas before the right of the landowner has been converted into ownership by possession at the surface; (4) that the state may adjust these correlative rights of the several landowners and the

right of the public by a statute to prevent unreasonable waste, leaving the measurement of the correlative rights and the determination of the unreasonable waste as questions of fact to a court of equity. These incidents of the land law of the states have been so long recognized in this court that their determination no longer raises a Federal question.

The subject is considered at greater length under Points C and D of Appellees' Brief on Motion to Dismiss, pp. 17-23.

The Unreasonable Waste Prohibited by the California Statute as Construed by the Supreme Court of That State Is Sufficienctly Certain to Meet All Tests of the Federal Constitution.

(This subject is covered under Point E of Appellees' Brief on Motion to Dismiss, pp. 23-29.)

> "The unreasonable waste of natural gas * * * is hereby declared to be opposed to the public interest and is hereby prohibited and declared to be unlawful. The blowing, release or escape of natural gas into the air shall be *prima facie* evidence of unreasonable waste." (Sec. 8b, Stats. 1929, p. 927, Supp. p. 4.)

Interpreting this language, the Supreme Court of California said:

> "We reiterate that the legislation in question has lawfully vested in the Superior Court the power to determine what wastage of gas in the production of oil is reasonable or unreasonable. *Whether such wastage is reasonable or unreasonable is a question of fact* and should be determined in view of the necessity of one landowner to make productive use of his parcel, in view of the equal right of the adjoining owners not to be deprived of correlative production from their parcels, and in view of the right of the

public to prevent the waste of that which cannot be replaced." (*People v. Associated Oil Co., et al.*, decided March 26, 1931, Appx. "C," Supp. p. 50.)

This court has said:

"The finding of *reasonableness*, like that of undue prejudice, is a determination of a fact by a tribunal informed by experience." (*Virginian R. Co. v. United States*, 272 U. S. 658, 665.)

The District Court of Appeal in its opinion on the order appealed from illustrated this rule of correlative rights to acquire ownership by possession as bounded by the prohibition against unreasonable waste in so doing by analogies from the law of waters where the term, "correlative rights," "reasonable use" and "unreasonable waste" are well known in the opinions of the Supreme Court of the State. (*Bandini Petroleum Co. v. Superior Court* [R. 357.] Copy of the opinion annexed hereto.)

Where correlative rights to beneficial use exist in a common source of water supply, the right of each landowner is to divert a reasonable share of water from the common source for use on his land. When the available supply is limited so that all the land entitled to irrigation may not receive all that can be beneficially used there must be a reasonable proration of the available supply. This does not mean that each acre shall receive the same quantity of water as every other acre or that each owner of land up stream shall have priority to the extent the cropping of his land requires. There are other factors in reasonable use. Land farmed for grain may require one acre foot, vines and trees three acre feet, alfalfa four acre feet, and rice six acre feet per annum. To produce the

same results with a clay subsoil, less than half the water may be required, while land with a rock and gravel subsoil may require twice the normal quantity. The result is that no quantity rule of reasonable use of water generally applicable can be laid down. In the use of water for irrigation there is always the necessary waste incidental to use. Dead water destroys pasturage and the continuous flow requires run-off. This also is the case in irrigating heavy soil while in the irrigation of gravelly soil there is less run-off but increased seepage below. In each case the limit is the boundary between reasonable use and unreasonable waste determined as a question of fact by a court of equity having jurisdiction of the parties possessing the common rights in the source of supply.

The analogy of this usufructuary right to natural gas in producing oil from a gas-oil field is well-nigh complete.

> "It is estimated that only from ten to twenty-five per cent of the total amount of oil deposited in a reservoir is ultimately recovered, depending on the natural characteristics of the reservoir and the methods employed in utilizing the lifting power of the gas. The importance of gas in the oil-producing industry has, therefore, become a question of great concern to the industry itself and to government, to the end that its function may be fully utilized without waste." (*People v. Associated Oil Co.*, Cal. Supreme Ct., Dec. 3, 1930, Supp. to Brief, pp. 34-35.)

The gas occupies the same position in making the field productive of oil that water occupies in making the surface fruitful with crops. It is the primary agent in producing an economic profit from otherwise barren land. There is the same right of many landowners in a common source of the fructifying supply. There is the same variation

among the owners in the quantity of the fructifying agency required to make the land produce the same economic return, be it oil or fruits of the soil. There is the same reason for prorating the allowed use of gas to the potential oil production that there is for prorating the allowed use of water to potential crop production. In each case the basic formula must be modified by other varying factors. These varying factors have such similarity in the two cases as to complete the analogy.

In *Burr v. Maclay Rancho Water Co.*, 154 Cal. 428, the court directed the judgment below to be modified so as to protect the owners of land over the subsurface percolating water who did not desire to make present use of the water against excessive drafts by those desiring to make present use,—a rule greatly to be desired at the present time in the use of gas to produce oil. In *Half Moon Bay Land Co. v. Cowell,* 173 Cal. 543, the court enumerated a long list of the factors properly to be considered in apportioning the waters of the stream among the riparian owners where there is not sufficient for the needs of all, including "the comparative profit of the different uses which could be made of the water on the land, and that when the water is insufficient for all the land or for all of the uses to which it might be applied thereon, and there is enough only for that use which is more valuable and profitable, the shares may properly be limited to and measured by the quantity sufficient for that use, and the proportions fixed accordingly." In the more recent cases of *Irrigation Dist. v. Mt. Shasta Power Corp.*, 202 Cal. 56, 63, and *Seneca C. G. M. Co. v. Great Western Power Co.*, 209 Cal. 206, 221, the court enlarges upon the

riparian right as being a reasonable proportion of the quantity available and not a fixed quantity out of the stream flow, applying in this regard the rule which this court applied to the use of gas in the case of *Walls v. Midland Carbon Co.*, 254 U. S. 300. In each case the ultimate fact is the *reasonable share* or proportion of the supply. The District Court of Appeal in its opinion on rendering the order appealed from discussed at some length the analogy between the rules of law applicable to the gas and water which will be found in the copy attached to this Statement.

Assuming that the standard of unreasonable waste contained in the language of the legislature was uncertain, it was clearly intelligible. When read with the interpretation by the Supreme Court of the State of California any uncertainty is made certain. This court as a Federal question reads the statute with the interpretation of the state courts. (*Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61.) If the interpreted statute meets the requirements of a primary standard properly referable to and found intelligible by a state tribunal, all requirements of the Federal Constitution are met (*Quong Ham Wah Co. v. Industrial Com.*, 225 U. S. 445, 448; *Pierce Oil Co. v. Hopkins*, 264 U. S. 137, 139).

Mr. Chief Justice White, speaking for this court in *Red "C" Oil Mfg. Co. v. Board of Agriculture*, 222 U. S. 379, 394, says:

> "The legislative requirement was that the illuminating oils furnished in North Carolina should be safe, pure, and afford a satisfactory light, and it was left to the board of agriculture to determine what oils

would measure up to these standards. We think a sufficient primary standard was established, and that the claim that legislative powers were delegated is untenable."

Here words of limitation are held a sufficient primary standard. "Safe", how safe? The ingenuity of man has never created any contraption perfectly safe. "Pure"—the imagination of theologians and the efforts of chemists have been spent in imagining or perfecting—comparative purity. "Afford a satisfactory light"—satisfactory for what purpose to to whom? The answer of course is that the statute required a reasonably safe oil, a reasonably pure oil, an oil which will afford a reasonably satisfactory light for the ordinary purposes of mankind when used in the accustomed way. The definition construed as requiring an oil reasonably safe, reasonably pure, and which will furnish a reasonably satisfactory light, fully meets the tests suggested by Mr. Chief Justice White in *United States v. Cohen Grocery Co.*, 255 U. S. 81, and by Mr. Chief Justice Taft in *Cline v. Frink Dairy Co.*, 274 U. S. 445, when the question is not one of price fixing. The decisions in this court holding the price fixing provisions of the Lever Act unconstitutional as not informing the common citizen of what was required of him are sufficiently distinguished by the Supreme Court of California in interpreting the statute of that state. (*People v. Associated Oil Co.*, Appendix B, Supp. to Brief, pp. 33-38.)

In construing Section 40 of the Lever Act as furnishing too uncertain a standard of conduct upon which the ordinary citizen engaged in business must act at his peril, this court has insistently said:

> "Observe that the section forbids no specific or definite act. It confines the subject matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee, the result of which no one can foreshadow or adequately guard against."

Clearly, the legislation of the State of California regulating the production of natural gas to prevent waste now under consideration, when applied to the peculiar subject matter involved, is quite different from the provisions of the Lever Act. By the California legislation, the operator of an oil and gas well is put on notice as soon as he permits any gas to be released to the air that he must justify such release as reasonable. He is told that it is the unreasonable waste of natural gas by the operator of any land in each particular oil field that is opposed to the public interest prohibited and declared to be unlawful. (Sec. 8b.) Each operator of oil wells within a given oil field knows what is meant by the reasonable production of gas in that field in the operation of the particular wells under his control, just as the farmer in an arid country knows when he is using an unreasonable share of water from the common source from which all farmers within his district must draw their supply. The California statute goes further, and while it charges the oil operator with notice that he is unreasonably wasting gas when he releases any to the air this notice is only *prima facie* evidence against him. He is entitled under the act as construed by the Supreme Court of the state to a hearing in a court of equity and to a finding upon evidence in the usual course of a trial in that court as to whether in fact he was or

was not unreasonably wasting the common supply of gas available to all operators in the field. The presumption holds only "until the condition is shown by legal proof" (*Freese v. Hibernia Sav. Soc.*, 139 Cal. 392, 395). "In prescribing that any waste shall be *prima facie* evidence of unreasonable waste, the state has cast upon the party found to be wasting gas the burden of justifying the same." (*People v. Associated Oil Co.*, December 3, 1930, 80 Cal. Dec. 607, 616, Supp. p. 39.) When the proof disclosed that appellants were blowing to the air over 22,000,000 cubic feet of gas a day amounting to forty per cent of their total production, the statutory *prima facie* evidence was sustained by positive proof which appellants had every opportunity to repel. The rule of the California Supreme Court conforms in every particular to the constitutional limitations required by this court. In fact the California rule is derived from decisions in this court. (*People v. Osaki*, 209 Cal. 169, 194, and cases cited.)

The right of the state to provide what shall constitute *prima facie* evidence in this class of cases has been sustained by this court. (*Lindsey v. National Carbonic Gas Co.*, 220 U. S. 61, 81.)

Under statutes of this kind something must necessarily be left to the judgment of the well operator, and there is an element of estimation involved when determining what is reasonable or unreasonable under the circumstances. But this is always true when the right of the person concerned is a joint or co-tenancy, or a correlative right in which others have a proportional interest. Sustaining the Wyoming statute to prevent the waste of gas this court said:

"It will be observed that the act under review does not prohibit the use of natural gas absolutely. It prohibits, or to use its words, declares it to be a 'wasteful and extravagant use of the gas when it is burned or consumed without the heat therein contained being fully and actually applied and utilized for either manufacturing or domestic purposes.' (314.)

* * * * * * * *

"We said, citing a case, 'possession of the land is not necessarily possession of the gas,' and again, on the authority of cases, 'that the property of the owner of lands in oil and gas is not absolute until it is actually in his grasp, and brought to the surface.' It was decided, however, that before that event occurs, indeed, in prevention of it, the state may interpose its power to prevent a waste or disproportionate use of either oil or gas by a particular owner in order to conserve the equal right of other owners and advance the public interest. (316-317.)

* * * * * * * *

"The determining consideration is the power of the state over, and its regulation of, a property in which others besides the companies may have rights, and in which the state has an interest to adjust and preserve, natural gas being one of the resources of the state. And in this consideration it is more important to consider not for what a particular owner uses the gas, but the proportion of his use to that of others; or it may be the prevention of use by others." (319.)

Walls v. Midland Carbon Co., 254 U. S. 300, 314, 316-317, 319.

West v. Kansas Natural Gas Co., 221 U. S. 229, referring to the Oklahoma statute in delivering the opinion of this court, Mr. Justice McKenna said:

"The provisions of the statute are not directed against waste. They are directed against any use of

> the gas except in the state. The right of the state 'to preserve the common supply for the equal use of all' owners is not denied by appellees. We put the question out of consideration therefore, except incidentally, *and concede the right of the state to preserve the supply of gas* as we shall hereafter set forth." (p. 251.)

The words "unreasonable waste of natural gas" as interpreted by the California courts have a meaning "well enough known to enable those within their reach to clearly apply them". They have "a well-known common law meaning" in the law of waters of California. From "the subjects with which the statute dealt a standard of some sort was afforded" which is made certain by the interpretation of the courts of the state.

The standard prescribed by the Supreme and Appellate Courts in California under the statute presents a more definite standard for the conduct of the oil operators "within their reach to clearly apply them" than was presented by the language sustained as sufficient in *United States v. Alford,* 274 U. S. 264. The provisions of the act, therefore, meet the conditions prescribed by this court, where you have said construing other statutes:

> "Men familiar with the range conditions and desirous of observing the law will have little difficulty in determining what is prohibited by it." (Omaechevarria v. Idaho, 246 U. S. 348.)

It is immaterial that the interpretation of the primary standard was left to the Superior Courts in California rather than to an administrative tribunal. (*Federal Radio Commission v. General Electric Co.,* 280 U. S. 537; *Prentis v. Atlantic etc. Line Co.,* 211 U. S. 210.)

Where the statute as construed by the state court of last resort meets the requirements of "due process of law" by charging the class of persons within reach of the statute with knowledge of what acts are prohibited there is no longer a Federal question for review in this court. (*Bevins v. State of Iowa*, No. 574, Oct. Term, 1930.)

Pleading and Record on Application for Writ of Prohibition.

To the *third* point, that of the evidence to sustain the findings essential to jurisdiction under state practice, the District Court of Appeal near the close of its opinion said:

> "Another answer to this argument of petitioners is that having determined that the court has the jurisdiction to determine what is an unreasonable waste, we cannot interfere by the writ of prohibition to deprive its judgment of effect. And we here direct attention to the determination of the respondent court that 'there appears to be an unreasonable waste of natural gas in the Santa Fe Oil Field', and 'that the evidence available . . . shows that the unreasonable waste of natural gas in said field may be substantially reduced and that the equities of all parties may be fairly conserved by a preliminary injunction which will limit the waste of gas by restricting the production thereof to a quantity reasonably in excess of the present outlets for beneficial use above ground, etc., etc.' It does not appear from the facts presented to us that in so far as the particular case before us is concerned the court exceeded its jurisdiction in finding as we have already quoted." [Opinion, R. 362-363.]

The so-called "Uncontradicted and Admitted Facts" (Appellant's Statement, pp. 9-18) are largely the controverted facts constituting the material issues raised by the complaint and answer in the cause pending before the

appellee Superior Court wherein the People of the State of California are plaintiffs and the appellants here are defendants. No replication to new matter alleged in the answer is required under California practice. (*Code Civil Proc.*, Sec. 462; *Planter v. Vincent*, 194 Cal. 442-3.) The demurrer of appellee court admitted the facts properly pleaded in the petition for the writ of prohibition, viz., that it was a court of general jurisdiction, that defendants had appeared in response to process, and that it would enforce the preliminary injunction pending the trial of the issues of fact unless prohibited by higher authority. It is only facts properly pleaded in the cause that are admitted by demurrer. (*Bank of Cal. v. Roberts*, 248 U. S. 497, 500.) These appellants could not substitute the appellee court as an adverse party in place of the plaintiffs, and by repeating in their petition for the writ of prohibition the allegations of their answer to the complaint below try in the District Court of Appeal the issues of fact raised by complaint and answer in the appellee trial court. When a party seeks to test the jurisdiction of a court on the ground that a statute violates the constitution, and it is necessary to establish a fact of which the court will not take judicial notice, the remedy of the party is by appeal. Where the court sought to be restrained by a writ of prohibition has general jurisdiction of the subject matter of the action and facts must be found to take the case out of its jurisdiction, the question cannot be presented on application for a writ of prohibition (*Murphy v. Superior Court*, 84 Cal. 592). Such was the conclusion reached in the instant case where the Supreme Court of the State of California denied a hearing after decision by the District Court of Appeal denying the writ of prohibition.

As this court, in *Ex parte Alix,* 166 U. S. 136, said:

> "The settled rules in reference to the writ of prohibition were thus laid down in *Re Rice,* 155 U. S. 396, 402 (39: 198, 201): 'Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary. Nor is the granting of the writ obligatory where the case has gone to sentence, and the want of jurisdiction does not appear upon the face of the proceedings. *Smith v. Whitney,* 116 U. S. 167, 173 (29: 601, 603; *Ex parte Cooper,* 143 U. S. 472, 495 (36: 232, 239.)'
>
> "Tested by these rules, we are clear that a proper case is not made for awarding the writ of prohibition."

Where the constitutionality of a statute is called in question by an application for a writ of prohibition or for other extraordinary remedy before trial on the issues of fact, the court is confined to the statute and matters of which it takes judicial knowledge. (*Stevenson v. Colgan,* 91 Cal. 652;*Frohliger v. Richardson,* 63 Cal. App. 209, 214.)

> "Issues of fact relating to the jurisdiction of the court are by no means usual, for the contention of the applicant ordinarily is either that the court has no jurisdiction of the subject matter, or though having jurisdiction of the subject matter, has no authority whatever to take the action complained of and sought to be prevented and whether such contention

> is well founded depends upon the constitution and laws of the state of which all courts must take notice. Where the case respecting which the writ is sought has proceeded to judgment, the jurisdiction of the court can be assailed only on the face of the proceedings, but even then the question may be presented whether this involves a re-examination of the evidence on which the court acted in so far as it relates to jurisdictional matters. 'Before judgment, if the court below persists in going on when it should not, the court above can examine not simply the process and pleadings technically of record, but the facts in evidence upon which the action is to be taken.'" (Prohibition, Sec. 33, Vol. 22, *R. C. L.* 32-33, citing and quoting from *In re Cooper,* 143 U. S. 472, 504, *et seq.*)

In *Jacobsen v. Superior Court,* 192 Cal. 319, so greatly relied upon by appellants, it was held that the jurisdiction of the Superior Court in equity was separate and distinct from its jurisdiction in eminent domain, and that the Superior Court in equity did not have jurisdiction by a temporary injunction to oust the owners of real property until by an action in eminent domain the public body entitled to acquire such easement as was necessary for public uses had done so by a proceeding for that purpose in eminent domain, saying:

> "This public right, however, has always and everywhere been limited and safeguarded by express provisions of the constitutions and statutes of the several states and it has been uniformly held that being *in invitum* and in derogation of the common right, its exercise is strictly defined and limited by the express terms of the constitution or statute creating it." (192 Cal. 325.)

Neither the Supreme Court nor the District Court of Appeal of California, nor this Court has ever held, suggested

or implied, that a court of equity in a cause arising in equity where it had jurisdiction of the subject matter and of the parties would be deprived of its equitable jurisdiction by a writ of prohibition because an appellate court considered that the Chancellor enjoined too much.

If we are to look to the evidence before the appellee court, which the District Court of Appeal found sufficient to sustain its jurisdiction, and the preliminary injunction in the exercise of that jurisdiction, we need turn only to the testimony of the witness Dr. Stanley Herold, quoted in Appendix B of the Supplement to Appellants' Brief, p. 14, where the witness says: "Water under hydrostatic head transmitting its pressure into *edgewater surrounding the pools*, is the source of energy throughout the remaining life of the wells on settled production." If hydrostatic head of edgewater is the source of producing energy, then every well opened into the pool is affected by the production of every other well, and it necessarily follows that the rights of each owner producing from the same pool are correlative.This question of the influence of adjacent wells producing from the same pool and the effect of back pressure in increasing the ultimate recovery of oil and reducing the daily production is considered in more detail in the affidavit of Mr. E. G. Gaylord [R. 79-85.] The quantity of gas blown to the air and the quantity of oil produced by appellants is shown in the schedules annexed to the preliminary injunction and the order modifying the preliminary injunction, but as appellants do not question that they were blowing to the air substantially forty (40%) per cent of the 57,120,000 cubic feet of gas produced, amounting to a daily blow of 22,848,000 cubic

feet and appellants were allowed to produce 28,160,000 cubic feet under the order (Appellants' Brief in Opposition to Motion, p. 14), it is unnecessary to make further reference to the evidence.

The penal provisions of the statute apply only to the inspection of wells, fraudulent reports and acts of similar character. (*People v. McKean*, 76 Cal. App. 119, *et seq.*, and cases cited; *McFadden v. Lick Pier Co.*, 101 Cal. App. 17.) In any event, as stated by this court in *Ohio River & W. R. Co. v. Dittey*, 232 U. S. 576, 594:

> "But these actions do not involve any present attempt to enforce the penalties; and the act contains a section which in terms declares: 'The sections of this act, and every part of such sections, are hereby declared to be independent sections and parts of sections, and the holding of any section or part thereof to be void or ineffective shall not affect any other section or part thereof.' The penalty clauses, if themselves unconstitutional, are severable, and there is therefore no present occasion to pass upon their validity."

Such a provision is also contained in Section 52 of the California statute.

The only remedy for enforcing the prohibition of the statute against the unreasonable waste of natural gas involved here is an action in equity in the appellee Superior Court under section 14b of the act which expressly provides that such action may be brought "regardless of whether proceedings have or have not been instituted under" the provisions of the act authorizing a hearing before the State Oil and Gas Supervisor. It is, therefore, unnecessary to consider the constitutional objections suggestive to those provisions of the act authorizing the State

Oil and Gas Supervisor to determine what is unreasonable waste. (*Board of Trade v. Olsen*, 262 U. S. 1, 42; *Bacon Service Corp. v. Huss*, 199 Cal. 21, 35.) His determination in any event could only be enforced after hearing *de novo* by the appellee court.

When a party attacks the constitutionality of a statute by application for a writ of prohibition or other extraordinary writ to halt the process of a court of equity in a matter of equitable cognizance, it must be prepared to demonstrate that the statute is void, root and branch, so that no possible decree can be valid under the statute. This must be the true rule, because if the writ of prohibition is granted the equity court is prohibited from going forward and finding the facts to differentiate situations in which the statute will be valid from those where there will be a violation of the supreme law. On the other hand, if the writ is denied and the injunctive orders of the equity court deprive a party of his constitutional rights by reason of any peculiar situation in respect to the subject matter, the error may be corrected by application to the equity court for modification of its orders or by appeal. The California Supreme Court and the District Court of Appeal in denying the writ of prohibition have done no more than say to the appellee equity court: "You have jurisdiction to determine the fact of what constitutes an unreasonable waste of natural gas under the statute. That determination is subject to appeal, and if and when such appeal is taken we will determine whether or not error has been committed." A writ of prohibition cannot be converted into a substitute for appeal where appeal is allowed. (*Truck Owners etc. Inc. v. Superior Court*, 194 Cal. 146,

155; *Mt. Vernon-Woodberry etc. Co. v. Alabama I. P. Co.*, 240 U. S. 30. See, also, *Swift & Co. v. United States*, 276 U. S. 311.)

If this court should reverse the California courts and order that a writ of prohibition issue to the appellee court of equity it would thereby prevent a trial on the merits to determine the questions of fact raised by the complaint and answer as to whether or not there were peculiar situations requiring a different form of injunction to be applied to some of the operating properties in the Santa Fe Springs Oil Field. The language of Mr. Justice Sutherland in respect to the applications of the statute to particular conditions as found in *Euclid v. Ambler Realty Co.*, 272 U. S. 395, and *Radice v. New York*, 264 U. S. 292, 296, is particularly pertinent here.

Conclusion.

It appearing that each of the Federal questions raised in the formal manner required have been explicitly decided by this court contrary to the contentions of appellants, and that if any error was committed by the appellee court it was committed in the exercise of jurisdiction and not in excess of its jurisdiction, it is respectfully submitted that this court should decline to take jurisdiction.

U. S. WEBB,
Attorney General of the State of California,
JAMES S. BENNETT,
Attorney for the Director of Natural Resources of the State of California,
Attorneys for Appellees.

Opinion of the District Court of Appeal.

Civil No. 7292. Second Appellate District, Division two. November 29, 1930.

Bandini Petroleum Company (a Corporation), Commodore Petroleum Company (a Corporation), Wilshire Oil Company, Inc., (a Corporation), Wilshire Annex Oil Company, (a Corporation), and Ambassador Petroleum Company (a Corporation), Petitioners, v. The Superior Court of the State of California, in and for the County of Los Angeles, and Honorable William Hazlett, as one of the Judges thereof, Respondents.

Application for writ of prohibition prayed to be directed to the Superior Court of Los Angeles County, William Hazlett, Judge, to restrain enforcement of a preliminary injunction and other orders in a proceeding to enjoin petitioners from unreasonably wasting natural gas from certain oil wells in Santa Fe Springs oil fields. Writ *denied.*

For Petitioners—Call & Murphey, Robert B. Murphey, Wm. L. Murphey.

For Respondents—U. S. Webb, Attorney-General; James S. Bennett.

Amici Curiae—Charles A. Son, Arthur R. Smiley, Roland Rich Woolley, Rush M. Blodget, George W. Nilsson, Robt. M. Pease, Roy P. Dolley.

This is an original prohibition proceeding. The petitioners seek to prevent the respondent court from enforcing a preliminary injunction and order modifying the same and also to check any further order or proceeding against them in an action pending in the respondent court entitled *People of the State of California on relation of*

Fred G. Stevenot, Director of Natural Resources of the State of California v. Associated Oil Company et al., which action was brought for the purpose of enjoining all of the defendants therein named from unreasonably wasting natural gas from their wells in the Santa Fe Springs oil field. On March 19, 1930, after hearing the parties to the action, the court granted a temporary injunction limiting and defining the amount of gas which the defendants would be allowed to permit to escape into the air from their wells in the field mentioned. On March 28, 1930, the court made another order somewhat relaxing the terms of the injunction pendente lite. It is asserted by petitioners that they have been irreparably injured and damaged by attempting to curtail the production of natural gas; that there is no market for a large part thereof and that if they are to be allowed as they claim it is their right, to employ the gas as a lifting power to raise the oil from below the surface they must of necessity permit a portion thereof to escape into the air; that prior to the temporary injunction they were producing 19,554 barrels of oil per day but that operating most efficiently under the amount of gas allowed to be used by the modified order they cannot possibly produce more than 10,211 barrels per day.

The action was instituted in the respondent court pursuant to the provisions of "An act to protect the natural resources of petroleum and gas from waste and destruction, etc.," (Stats. 1929, p. 923) the sections of which pertinent at this point in our discussion read as follows: "Sec. 8b. The unreasonable waste of natural gas by the act, omission, sufferance or insistence of the lessor, lessee or operator of any land containing oil or gas, or both,

whether before or after the removal of gasoline from such natural gas, is hereby declared to be opposed to the public interest and is hereby prohibited and declared to be unlawful. The blowing, release or escape of natural gas into the air shall be prima facie evidence of unreasonable waste. (Sec. 14b.) Whenever it appears to the director of the department of natural resources that the owners, lessors, lessees or operators of any well or wells producing oil and gas or oil or gas are causing or permitting an unreasonable waste of gas, he may institute, or have proceedings insituted, in the name of the people of the State of California, to enjoin such unreasonable waste of gas regardless of whether proceedings have or have not been instituted under section 8" (a section authorizing the oil and gas supervisor to issue certain orders) "hereof, and regardless of whether an order has or has not been made therein. Such proceedings shall be instituted in the superior court for the county in which the well or wells from which the unreasonable waste of gas is occurring or any thereof are instituted. The owners, lessors, lessees or operators causing or permitting an unreasonable waste of gas in the same oil or gas fielld, although their properties and interests may be separately owned and their unreasonable waste separate and distinct, may be made parties to said action. In such suits no restraining order shall be issued ex parte, but otherwise the procedure shall be governed by the provisions of chapter three, title seven, part two of the Code of Civil Procedure of the State of California" (a chapter relating to injunctions) "and no temporary or permanent injunction issued in such proceedings shall be refused or dissolved or stayed pending appeal

upon the giving of any bond or undertaking, or otherwise."

The arguments of the petitioners may be grouped into the following propositions: First: The act deprives petitioners of property without just compensation and without due process of law. Second: The statute is void for uncertainty and for failure of the legislature to define a standard of conduct. Third: The enactment permits the use of gas for lifting purposes in a reasonable proportion to the amount of oil produced and that the uncontroverted evidence shows no other or greater use and for that reason the court was without jurisdiction to grant the temporary injunction.

Turning then to the first contention, it is asserted that the act is violative of the Fourteenth Amendment to the federal Constitution and sections 12 and 14 of article I of the state Constitution. To put the argument most favorably for the petitioners it is asserted that they have the same vested right to make use of the gas under their property for the purpose of lifting the oil thereunder that a riparian owner has to make use of the underflow of a stream passing through his property to lift the waters to levels of entry upon his land. It is therefore insisted by counsel that it is of prime importance to examine the nature of petitioners' rights. While this is true in a degree, yet we do not attach the same weight as do petitioners to the pure legal question whether the owner of the surface is the owner of the gas in place under his soil subject to the right of an adjoining owner to appropriate to himself the title thereto by capture and possession, or whether the owner of the surface vested only with the right to bore

for gas and reduce it to possession. In either event he is the owner of a valuable right. Every owner of the surface has a like interest and right of property, whatever it may be. We think, however, that the better reasoning, on account of the self-propelling or migratory character of natural gas, as well as oil, dictates the conclusion that while in general we may speak of the owner of the surface as being the owner of the gas and oil in place, what we really mean is that he and he alone has the right through his own property to endeavor to reduce the substances to possession; that when they are reduced to possession and then only does he have an absolute and unqualified title thereto. It is argued by petitioners and by some of those who have appeared as amici curiae that the law of California is settled to the effect that the owner of the surface is the owner of the gas and oil in situ. There are some general expressions in the authorities to this effect, particularly in tax cases where assessments have been levied upon a lease giving and granting to the lessee the right to bore for and extract the hydro-carbon substances. But they are not controlling or helpful here. On the other hand, in distinguishing between oil and other minerals in the case of *Acme Oil Co. v. Williams,* 140 Cal. 681, 74 Pac. 296, the Supreme Court said: "Oil, on the contrary, is of a fluctuating, uncertain, fugitive nature, lies at unknown depths, and the quantity, extent, and trend of its flow are uncertain. It requires but a small surface area, in what is known as an oil district, upon which to commence operations for its discovery. But when a well is developed the oil may be tributary to it for a long distance through the strata which holds it. This flow is not inex-

haustible, no certain control over it can be exercised, and its actual possession can only be obtained, *as against others in the same field,* engaged in the same enterprise, by diligent and continuous pumping. *It is the property of anybody who can acquire the surface right to bore for it,* and when the flow is penetrated, he who operates his well most diligently obtains the greatest benefit, and this advantage is increased in proportion as his neighbor similarly situated neglects his opportunity." (Italics ours.) It is the co-existence of these rights which authorizes the state to make use of its legislative power. When the rights of one impinge upon the rights of others the state may interpose for the purpose of adjusting and regulating the enjoyment of those rights. This is, in a large part at least, the foundation of all the authorities which support the power of the state to regulate the production of oil and gas. In *Ohio Oil Co. v. Indiana,* 177 U. S. 190, 44 L. Ed. 729, it is said: "No one owner of the surface of the earth, within the area beneath which the gas and oil move, can exercise his right to extract from the common reservoir, in which the supply is held, without to an extent diminishing the source of supply as to which all other owners of the surface must exercise their rights. The waste by one owner, caused by a reckless enjoyment of his right of striking the reservoir, at once, therefore, operates upon the other surface owners," and ". . . (T)he surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property. *But there is a coequal right in them all to take from a common source of supply the two substances which in the nature of things*

are united, though separate. It follows from the essence of their right and from the situation of the things as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right to the detriment of the others, *or by waste by one or more to the annihilation of the rights of the remainder.* Hence it is that the legislative power, from the peculiar nature of the right and objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment, by them of their privilege to reduce to possession, and to reach the like end by preventing waste." (Italics ours.) In *Lindsley v. Natural Carbonic Gas Co.,* 220 U. S. 61, 55 L. Ed. 369, where the court was considering a statute designed to prevent the waste of natural mineral water by pumping for the purpose of extracting the gas therefrom, after reference to and a discussion of the Ohio Oil Company case just mentioned, it is said: "The mineral waters and carbonic acid gas exist in a commingled state in the underlying rock, and neither can be drawn out without the other. They are of value in their commingled form and also when separated, but the greater demand is for the gas alone. Influenced by this demand, some surface owners, having wells bored or drilled into the rock, engage in extensive pumping operations for the purpose of collecting the gas and vending it as a separate commodity. Usually where this is done an undue proportion of the commingled waters and gas is taken from the common supply, and a large, if not the

larger, portion of the waters from which the gas is collected is permitted to run to waste. Thus these pumping operations generally result in an unreasonable and wasteful depletion of the common supply and in a corresponding injury to others equally entitled to resort to it. It is to correct this evil that the statute was adopted, and the remedy which it applies is an enforced discontinuance of the excessive and wasteful features of the pumping. It does not take from any surface owner the right to tap the underlying rock and to draw from the common supply, but, consistently with the continued existence of that right, so regulates its exercise as reasonably to conserve the interests of all who possess it. That the state, consistently with due process of law, may do this, is a necessary conclusion from the decision in the case cited. But were the question an open one, we still should solve it in the same way." We ought to pause long enough to direct attention to this last sentence on account of its bearing upon the argument presented here that the rule established by *Ohio Oil Co. v. Indiana,* supra, has become obsolete.

In *Commonwealth v. Trent,* 117 Ky. 34, 4 Am. & Eng. Ann. Cas. 209, the court places the source of the regulatory power upon both grounds in the following language: "It is well known that the supply of gas is limited, and may be exhausted. The act is intended to protect the supply from waste. Under the act, it is conceded, a person to exhaust the supply of his neighbor, cannot put down wells on his own land and allow the gas to escape from the well. . . . The legislature may protect from waste the natural resources of the state, which are the common heritage of all. The right of the owner of property to do

with it as he pleases is subject to the limitation that he must have due regard for the rights of others. To allow the storehouse of nature to be exhausted by the waste of the gas would be to deprive the state and its citizens of the many advantages incident to its use. That the legislature may prevent this is well settled." (Citing cases.) In Oklahoma the statute not only prevented the escape of gas into the air, "the intentional drowning with water of a gas stratum", the "underground waste" of gas, but also the "wasteful utilization of such gas". The supreme court of that state in the case of *Quinton Relief Oil & Gas Co. v. Corporation Commission,* 224 Pac. 156, after referring to *Walls v. Midland Carbon Co.,* 254 U. S. 300, 65 L. Ed. 276, where a somewhat similar statute of Wyoming was under scrutiny, said: "A careful examination of the authorities show that there is almost unanimity in holding that the burning of natural gas for carbon purposes in high pressure fields, having sufficient rock pressure to force gas through a pipe line to domestic consumers, and where the same may be used for such purpose, constitutes a wasteful utilization thereof. Natural gas has twice the heating units as (sic) artificial gas, and taking into consideration the convenience of natural gas, it is intrinsically worth more than artificial gas; its market value being from $2.00 to $3.00 per thousand cubic feet. The amount of carbon black produced from 1000 cubic feet of natural gas has a market value of about 10 cents. It therefore is obvious that the state, in the proper exercise of its police power and in conservation of so valuable a natural resource as natural gas, may prohibit the wasteful utilization of the same in the interest of the public welfare." In *State v.*

Carson Carbon Co., 162 La. 781, 111 So. 162, the supreme court of Louisiana sustained an enactment by which the owners of gas wells were prohibited from taking and using for the manufacture of carbon black more than 20 per cent of the potential capacity of a gas well. In *Oxford Oil Co. v. Atlantic Oil & Producing Company*, 22 Fed. (2d) 597, the court says: "The right of a state to so regulate the drilling of wells for oil and gas as to conserve the rights of adjoining owners is too well settled to admit of serious controversy. (*Ohio Oil Co. v. Indiana*, 177 U. S. 190, 20 S. Ct. 576, 44 L. Ed. 720; *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 31 S. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160.) It was within the power of the legislature to lay down a general rule for the protection of the mineral rights of the owners of adjoining lands, and to leave the details of enforcing that rule to an administrative agency or board. (*Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 34 S. Ct. 359, 58 L. Ed. 713.)" By a divided court in the case of *Walls v. Midland Carbon Co.*, 254 U. S. 300, 65 L. Ed. 276, a statute of Wyoming declaring the use of natural gas from a well within 10 miles of an incorporated city "without the heat therein contained being fully and actually applied and utilized for either manufacturing or domestic purposes" to be a "wasteful and extravagant use" and unlawful, was held valid and constitutional. The court reasserted the doctrine that "a state may consider the relation of rights, and accommodate their coexistence, and, in the interest of the community, limit one that others may be enjoyed." It also says: "The determining consideration is the power of the state over, and its regulation of, a property in which others besides the companies may have rights and in which

the state has an interest to adjust and preserve, natural gas being one of the resources of the state. And in this consideration it is more important to consider not for what a particular owner uses the gas, but the proportion of his use to that of others, or, it may be, the prevention of use by others; . . ." It is apparent from the quotations that the legislative power of the state may be exercised for the purpose of adjusting coexisting rights. They also tend to indicate that the state may restrict or regulate the production of oil or gas on the theory of the public's interest in their natural resources. Whether this latter may be done we think is unnecessary to a decision of the present application. But as indicating that there is grave doubt concerning this power we here make reference to the case of *West v. Kansas Natural Gas Co.*, 221 U. S. 229, 55 L. Ed. 716. The state of Oklahoma attempted to prohibit the construction of pipe lines for natural gas or the transportation of the same except by domestic corporations, the charters of which were to provide that it should only be transported between points in the state and not outside. The court in declaring the statute void said with reference to the power of the state to "preserve the common property" as distinguished from the right of the state to prevent waste: "The extent of power which the second question implies a state possesses challenges serious inquiry. The natural resources of a state may be other than natural gas; for example, may be timber and coal and iron and other metals; but it is contended that the right of conservation extends to these, and the broad statement of the first question" (the right of the state to preserve its resources) "is qualified in the argument by the

properties of natural gas and the limitation of its supply. This, it is contended, gives a range to the police power of the state which otherwise it would not possess. And such power, as we understand the further contention to be, may determine not only the conservation of the resources of the state but as to what class of persons may use them, as dependent upon their transportation in state, rather than in interstate commerce. . . . The statute of Indiana" (considered in *Ohio Oil Co. v. Indiana,* supra) "was directed against waste of the gas, and was sustained because it protected the use of all the surface owners against the waste of any. The statute was one of *true conservation securing the rights of property, not impairing them.* Its purpose was to secure to the common owners of the gas a proportionate acquisition of it—a reduction to possession and property—not to take away any right of use or disposition after it had thus become property. It was sustained because such was its purpose; and we said that the surface owners of the soil, owners of the gas as well, *could not be deprived of the right to reduce it to possession without the taking of private property.* It surely cannot need argument to show that if they could not be deprived of the right to reduce the gas to possession, they could not be deprived of any right which attached to it when in possession. The Oklahoma statute far transcends the Indiana statute. It does what this court took pains to show that the Indiana statute did not do. It does not protect the rights of all surface owners against the abuses of any. *It does not alone regulate* the right of the reduction to possession of the gas, but, *when the right is exercised,* when the gas becomes property, takes from it the attributes of property—the right

to dispose of it; indeed, selects its market, to reserve it for future purchasers and use within the state, *on the ground that the welfare of the state will thereby be subserved. The results of the contention repel its acceptance. Gas, when reduced to possession, is a commodity; it belongs to the owner of the land; and, when reduced to possession, is his individual property, subject to sale by him, and may be subject to intrastate commerce and interstate commerce.* The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial—the business welfare of the state, as coal might be, or timber. Both of those products may be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a state would confine them to the inhabitants of the state. If the states have such power, a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one state has it, all states have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we have said that 'in matters of foreign and interstate commerce there are no state lines.' In such commerce, instead of the states, a new power appears and a new welfare—a welfare which transcends that of any state. But rather let us say it is constituted of the wel-

fare of all of the states, and that of each state is made the greater by a division of its resources, natural and created, with every other state, and those of every other state with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward, it must be done by the authority of another instrumentality than a court." (Italics ours.)

It is argued, however, that the statute involved herein does not proceed upon the theory of correlative rights, but only upon the policy of conserving or preserving the common supply. We cannot assent to this statement or construction of the enactment. It is true that section 8b of the act declares the "unreasonable waste of natural gas . . . to be opposed to the public interest" and "to be unlawful," but it is also apparent from a reading of the entire act that unreasonable waste of gas is considered to be the production of an undue proportion of gas to the amount of oil, in the particular field involved, by one surface owner as against others, in those instances where the gas is not conveniently necessary for the "generation of light, heat, power or other industrial purpose." That this is the intent and purpose of the law is made manifest from the following quotation from section 8d: "If it shall appear that gas is being produced from any oil well or wells in quantities exceeding *a reasonable proportion to the amount of oil produced* from the same well or wells, even though it is shown that such excess gas is being used in the generation of light, heat, power or other industrial purpose and that there is sufficient other gas available for such uses from other wells in the same or

other fields in which the gas produced is not in excess of the amount which bears *a reasonable proportion to the amount of oil produced* from such other wells and that there are adequate gas-pipe-line connections between such other wells and the place of utilization of such gas the state oil and gas supervisor shall hold that such excess production of gas is unreasonable waste thereof if such holding will not cause an unreasonable waste of gas in any other field." (Italics ours.) The legislation was evidently adopted upon the theory that in every oil field there is what we may term (at least for illustrative purposes) a normal proportion of gas to oil; that when an unreasonable disproportion of gas to oil exists in a given well there is a corresponding loss of recoverable oil by other owners who would otherwise employ the lifting power of the excessive gas to good purpose; and that this disproportionate production of gas should not be permitted unless the gas as a separate thing be conveniently necessary for domestic or industrial purposes. We have not overlooked the fact that the act makes the blowing or release of gas into the air prima facie proof of unreasonable waste. It is to be observed, however, that such waste is not absolutely prohibited as it was in *Ohio Oil Co. v. Indiana, supra,* but is only made a rule of evidence. But even if such were the results of the act the authorities from which we have quoted would dispose of the arguments of the petitioners. We are, therefore, irresistibly led to conclude that the statute here involved is not as stringent in its restrictions as those in other jurisdictions, and further, that it does not deprive the petitioners of property without just compensation or due process

of law but rather falls within the legislative authority of the state with the wisdom of which we cannot be concerned.

We also find authority of a persuasive character in our own state. In *Ex parte Elam,* 6 Cal. App. 233, 91 Pac. 811, the court was considering a statute to prevent the waste and flow of artesian wells and making it a misdemeanor to waste the flow thereof. On account of the pertinency of the discussion relative to a similar argument we deem it expedient to set forth in full the first question raised therein and the response of the court thereto. We quote as follows:

"The first point made by petitioner—which is that the act is violative of the fourteenth amendment of the Constitution of the United States, which provides that no state shall 'deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law,' and of article I, section 1 of the Constitution of this state, which provides that 'all men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property,' and of section 13, article I, which provides that no person shall be 'deprived of life, liberty, or property without due process of law'—seems to have been met and demonstrated to be untenable by the Supreme Court of the United States in the case of *Ohio Oil Co. v. State of Indiana,* 177 U. S. 190, 20 Sup. Ct. Rep. 576. By that case it is established that water, oil, gas, and all fugitive substances held in their natural subterranean reservoirs are exceptions to

the general rule establishing absolute ownership in the proprietor of the surface of all that lies underneath; that these minerals being migratory in their nature, having no fixed situs, are a part of the soil only so long as they are on or in it, but after they escape and go to other lands the title of the former owner is gone; that it follows, therefore, that no one owner of the surface of the earth within the area beneath which these minerals move can exercise his right to extract from the common reservoir in which the supply is held without diminishing the source of supply as to which all other owners of the surface must exercise their rights; that in consequence of the nature of the deposits, of their transmissibility, of their interdependence, of the rights of all and of the public at large, the state could lawfully exercise the power to regulate the right of the surface owners among themselves to seek to obtain possession, and to prevent the waste of the products in which all the surface owners within the area wherein they were deposited, as well as the public, had an interest. 'No devesting of private property under such a condition can be conceived, because the public are the owners, and the enacting by the state of a law as to the public ownership is but the discharge of the governmental trust resting in the state as to property of that character.' This water, the ownership of which, until actual possession is acquired, being in the public, or at least that portion of the public who may own the surface of the soil within the artesian belt, is subject to a reasonable use only by those interested therein. This reasonable use is determined in *Katz v. Walkinshaw,* 141 Cal. 134, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, to be the

use of such amount of the subterranean water 'as may be necessary for some useful purpose in connection with the land from which it is taken.' The conditions existing in this state with reference to the necessity for the conservation of irrigating waters are most clearly set out in the case last cited, and the reasons for the rule restricting the use clearly shown. Whenever a land owner exceeds this reasonable use he is appropriating to himself that which belongs to others who are entitled to a like use, and to that extent is obstructing the free use of property so as to interfere with its comfortable enjoyment, and which, by sections 3479 and 3480, Civil Code, is declared to be a public nuisance. Whatever right one has, even in his own, is subject to that established principle that his use shall not be injurious to the rights of others, *or of the general public*. This act, therefore, relates to waters, the right to the use of which is common to a large portion of the community, and affects the general public right. Legislation in relation thereto affects the public welfare, and the right to legislate in regard to its use and conservation is referable to the police power of the state, which is declared in *Ex parte Whitwell*, 98 Cal. 78, 35 Am. St. Rep. 152, 32 Pac. 870, to be 'the power to make laws to secure the comfort, convenience, peace and health of the community.' 'The police power, deriving its existence from the rule that the safety of the people is the supreme law, justifies legislation upon matters pertaining to the public welfare, the public health, or the public morals.' (*Ex parte Drexel*, 147 Cal. 766, 82 Pac. 429.) It is settled law that all property is held subject to the exercise of police power, and that provisions

of the Constitution declaring that property shall not be taken without due process of law have no application in such cases. (*Odd Fellows' Cem. Assn. v. San Francisco,* 140 Cal. 230, 73 Pac. 987.)" (Italics ours.)

It is to be observed that the case of *Ohio Oil Co. v. Indiana,* supra, is approved and legislation of a character very much akin to the enactment now under scrutiny has been found not to invade the constitutional provisions against deprivation of property without compensation and without due process of law.

In the discussion of the problem to this point we think the essential difference from the question involved in *Herminghaus v. Southern California Edison Co.,* 200 Cal. 81, 252 Pac. 607, is made apparent. It is to be noted that the contest in that case was between a riparian owner, whose rights have long been established in our jurisdiction, and an appropriator of water who cannot divest a private existing right by his act of appropriation. This is quite a different thing from the adjustment and regulation of the coexisting rights of several persons. The rights here involved are more nearly analogous to those discussed in *Ex parte Elam,* supra, and in *Eckel v. Springfield Tunnel etc. Co.,* 87 Cal. App. 617, 262 Pac. 425, in the latter of which cases the rule was reannounced that as between riparian owners one can only take his reasonable share thereof. It is there determined that he cannot take all that is reasonably required to develop his land, but only that amount that will not unreasonably deprive the owners of coequal rights of a proper proportion.

We therefore turn to the second angle of our problem: Is the statute void for uncertainty and the failure of the

legislature to define a standard of conduct? The objection thus urged against the enactment arises from the use of the word "unreasonable." Were it not for the argument that it is not waste to permit the use of the gas to lift the oil to the surface it would be obvious that without the qualifying word the enactment could not be subjected to attack on the ground of uncertainty. As we have heretofore observed, the Indiana statutes prohibited all waste, and the United States Supreme Court concluded it to be a proper exercise of the legislative authority despite the argument that the owners of the surface were entitled to make use of its force to raise the oil from beneath the ground. Undoubtedly the legislature had in mind the Indiana statute and its construction, as well as others from other oil producing states. It would seem to logically follow that they made use of the word unreasonable for the very purpose of providing that the operators of a well might utilize a reasonable proportion of gas for the purpose of lifting the oil to the surface. This thought coincides with that indicated by the language we have already quoted to the effect that it shall be held to be an unreasonable waste of gas for one to produce gas in excess of "a reasonable proportion to the amount of oil produced," when such gas is not conveniently necessary for other than lifting purposes. When viewed in this light we think the word unreasonable is not so uncertain as to render the enactment void and inoperative. In fact, our courts have frequently applied the rule of reasonable use between riparian owners where similar correlative rights are involved. We have already cited the case of *Eckel v. Springfield Tunnel etc. Co.*, and *Ex parte Elam*, and to these we may add the following: *Irrigation Dist.*

v. Mt. Shasta P. Corp., 202 Cal. 56, 259 Pac. 444; *Turner v. The James Canal Co.*, 155 Cal. 82, 99 Pac. 520. In the latter of these two cases the words are so pertinent that they should be quoted. They are: "Out of regard to the equal rights of others whose lands may abut upon the same water the law has declared, as will hereafter be more fully shown, that the use of the water for irrigation, so far as it affects the rights of others similarly situated, *must be reasonable*, and must be confined to a reasonable share thereof. But with this common limitation, the right to use water upon adjoining land applies as well to the water of a lake, pond, slough or any natural body of water, by whatever name it may be called, as to a running stream." (Italics ours.) In a slightly different situation, but still for the purpose of adjusting coequal rights, the Supreme Court applied the same doctrine in *Katz v. Walkinshaw*, 141 Cal. 128, 74 Pac. 766, and *San Bernardino v. Riverside*, 186 Cal. 25, 198 Pac. 784. In the former it said: "The doctrine of *reasonable use*, on the other hand, affords some measure of protection to property now existing, and greater justification for the attempt to make new developments. It limits the right of others to such amount of water as may be necessary for some useful purpose in connection with the land from which it is taken. . . . The objection that this rule of correlative rights will throw upon the court a duty impossible of performance, that of apportioning an insufficient supply of water among a large number of users, is largely conjectural." In the latter we find these words: "With regard to such land owners these cases hold that each owner of land overlying the same general underground supply of water may take such water on his own

land for any beneficial use thereon, so long as such taking works no *unreasonable injury to other land overlying such waters;* that if the natural supply is not sufficient for all such owners, each is entitled only to his *reasonable* proportion of the whole, and that each may apply to the courts to restrain an injurious and unreasonable taking by another and to have the respective rights adjudicated and the use regulated so as to prevent unnecessary injury and restrict each to his reasonable share." (Italics ours.)

These authorities set at rest the contention that the enactment is uncertain as well as the incidental assertion that the legislature has by the language of the act and its failure to define a standard of conduct with greater rigidity, attempted to confer upon the court a legislative function. From them, as well as those cases such as *Standard Oil Co. v. U. S.,* 221 U. S. 1, 55 L. Ed. 619, wherein the court announced and adopted the "rule of reason" holding that it was only those unreasonable restraints of trade which were intended to be curbed by the Sherman Anti-trust Act, we find that the courts have for a considerable period of time been accustomed in *circumstances such as are concerned in the present enactment to apply the standard and guide of reason for the adjustment of those rights the unrestricted exercise of which would injuriously affect the rights of others.* In fact, it is not a new rule in the domain of jurisprudence but a new adaptation of the old maxim: "sic utere tuo ut alienum non laedas." (Italics ours.)

Sufficient has been said to effectually dispose of the remaining argument of the petitioners and demonstrate that it is founded on a misconception of the legislative intent.

Their argument is in effect that they are not producing an undue proportion of gas when the gas production is measured by the oil from one specific well. But this is obviously not the purpose of the law, as may clearly be indicated by a single illustration. Suppose a well is drilled and comes in, as what is commonly termed "a gasser," that is, a well which produces an insignificant quantity of oil. Conceivably such a well might drain the field of its supply of gas, leaving the oil therein unrecoverable, to the great and irreparable injury of the other surface owners. We have instanced an extreme possibility, but our interpretation of the act is that it was intended to remedy a lesser, but nevertheless unreasonable, degree of waste of the same character.

Another answer to this argument of petitioners is that having determined that the court has the jurisdiction to determine what is an unreasonable waste, we cannot interfere by the writ of prohibition to deprive its judgment of effect. And we here direct attention to the determination of the respondent court that "there appears to be an unreasonable waste of natural gas in the Santa Fe Oil Field," and "that the evidence available . . . shows that the unreasonable waste of natural gas in said field may be substantially reduced and that the equities of all parties may be fairly conserved by a preliminary injunction which will limit the waste of gas by restricting the production thereof to a quantity reasonably in excess of the present outlets for beneficial use above ground, etc., etc." It does not appear from the facts presented to us that in so far as the particular case before us is concerned the court exceeded its jurisdiction in finding as we have already quoted.

It is suggested in the briefs that the legislatu.. is without authority to restrict the production of oil, and lest we be misunderstood we deem it expedient to add that the record does not indicate the temporary injunction was founded upon such a theory. Nor are we determining that the act attempts to confer upon the court any such power. Rather we are convinced that a proper construction of the enactment confines the authority within the limits of enjoining the production of gas when in excess of the reasonable proportion to the oil for the particular field involved, when not conveniently necessary for other than lifting purposes.

Writ of prohibition denied.

IRA F. THOMPSON, *J.*

We concur:

WORKS, *P. J.*

CRAIG, *J.*